

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OLIVIA MORA,

Plaintiff,

v.

UNITED STATES CENSUS BUREAU, et
al.,

Defendants.

CASE NO. C13-1105RAJ

ORDER ON MOTION TO DISMISS
& ORDER TO SHOW CAUSE

I. INTRODUCTION

This matter comes before the court on Defendants' motion to dismiss. No one has requested oral argument and the court finds oral argument unnecessary. For the reasons stated below, the court neither grants nor denies the motion, except to the extent it rules that many of the arguments Defendants raised are inapplicable to this case. Instead the court orders Plaintiff Olivia Mora to show cause why the court should not grant summary judgment to Defendants on the grounds that her case is untimely. Ms. Mora's response to the order to show cause is due no later than May 22, 2014. The clerk shall TERMINATE Defendants' motion to dismiss (Dkt. # 12) and create a motion calendar for May 22, 2014 to address this order to show cause.

II. BACKGROUND & ANALYSIS

In her complaint, Ms. Olivia Mora contends that the Defendants failed to accommodate her disability when she took an exam in March 2009 for employment at the

1 United States Census Bureau. She contends that she explained to Census Bureau officials
2 in advance of the exam that she needed accommodations to take the exam. She asserts
3 that the Census Bureau agreed to provide her with a certified proctor to administer the
4 exam to her, and assured her that a proctor would be present for the March 2009 test. She
5 also asserts that because she had a “Schedule A letter,” she should not have been required
6 to take the exam. She made several calls in February 2009 to Benjamin Mohammed, a
7 Census Bureau employee, to attempt to discuss the Schedule A letter. Mr. Mohammed
8 did not return her calls.

9 When she arrived for the March 2009 test, she discovered that Census Bureau
10 employee Martha Hills was the person administering it. There was no certified proctor
11 available. Although Ms. Hills administered the test to Ms. Mora with some
12 accommodations (*e.g.*, she gave the exam after others had completed it, and read the test
13 to Ms. Mora), Ms. Mora failed the exam. Ms. Mora contends that the Census Bureau did
14 not hire her as a result. She claims that she tried to schedule another exam, but that the
15 Census Bureau did not permit her to do so.

16 Ms. Mora thus states a straightforward claim for disability discrimination. She did
17 so, however, without the assistance of an attorney. Perhaps for that reason, she did not
18 cite the federal law under which she was seeking relief. In addition, she used a form for
19 her complaint entitled “Civil Rights Complaint Under 42 U.S.C. § 1983” even though
20 there is no other indication that she intended to bring a § 1983 claim. Her complaint
21 named the Census Bureau, Mr. Mohamed, and Ms. Hills as Defendants.

22 She filed her complaint in June 2013. About half a year earlier, in December
23 2012, she had filed essentially the same complaint, making the same allegations against
24 Mr. Mohamed and Ms. Hills. She voluntarily dismissed that case in October 2013. *See*
25 *Mora v. Barnhart*, No. 12-2215JLR.

26 Defendants have filed a motion to dismiss raising two arguments, both of which
27 misconstrue Ms. Mora’s complaint. First, they contend that Ms. Mora failed to state a

1 claim for a violation of her constitutional rights (invoking either § 1983 or a so-called
2 *Bivens* suit for a constitutional violation by a federal agent), and that she could not sue
3 agents or agencies of the United States for such claims in any event. The court ignores
4 that portion of Defendants’ motion. Ms. Mora did not attempt to state a constitutional
5 claim or any other § 1983 claim.¹ She simply used a form intended for § 1983 suits to
6 bring a claim of disability discrimination.

7 Defendants also argued that Ms. Mora’s nonexistent constitutional claims were
8 untimely, citing the three-year statute of limitations that applies to § 1983 and *Bivens*
9 actions. That argument, along with the state-law tolling arguments Defendants
10 incorporated therein, is irrelevant for the reasons that the court has already stated.

11 Although the court finds Defendants’ primary arguments irrelevant, it now
12 considers whether Ms. Mora’s complaint is timely under the statute of limitations that
13 applies to a claim against a federal employer for disability discrimination. Defendants
14 made a cursory mention of that statute of limitations in their motion to dismiss.

15 Disability discrimination claims against the federal government arise under
16 Section 501 of the Rehabilitation Act of 1974. 29 U.S.C. § 791. Ms. Mora mentioned
17 the Americans with Disabilities Act (“ADA”) in her opposition to the motion to dismiss,
18 but the ADA does not apply to the federal government. *See* 42 U.S.C. § 12111(5)(B)(i)
19 (declaring that the federal government is not an “employer” for purposes of the ADA);
20 *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (noting that § 501 incorporates
21 ADA standards); *Johnston v. Horne*, 875 F.2d 1415, 1420-21 (9th Cir. 1989) (concluding
22 that § 504 of Rehabilitation Act provides no cause of action against a federal employer).

23 The court now considers whether Ms. Mora has a viable Rehabilitation Act claim.
24 Because the court considers that claim on a motion to dismiss via Federal Rule of Civil

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26 ¹ In response to Defendants’ motion to dismiss, Ms. Mora pointed to the Thirteenth and
27 Fourteenth Amendments to the United States Constitution. She states no claim under either
28 Amendment, and the court doubts that she would even have mentioned them but for the
Defendants’ discussion of her purported constitutional claims.

1 Procedure 12(b)(6), the court must assume the truth of the complaint's factual allegations
2 and credit all reasonable inferences arising from its allegations. *Sanders v. Brown*, 504
3 F.3d 903, 910 (9th Cir. 2007). The plaintiff must point to factual allegations that "state a
4 claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
5 568 (2007). If the plaintiff succeeds, the complaint avoids dismissal if there is "any set of
6 facts consistent with the allegations in the complaint" that would entitle the plaintiff to
7 relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-
8 pleaded factual allegations, a court should assume their veracity and then determine
9 whether they plausibly give rise to an entitlement to relief."). The court typically cannot
10 consider evidence beyond the four corners of the complaint, although it may rely on a
11 document to which the complaint refers if the document is central to the party's claims
12 and its authenticity is not in question. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
13 2006). The court may also consider evidence subject to judicial notice. *United States v.*
14 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

15 A Rule 12(b)(6) motion may also serve as a vehicle for asserting an affirmative
16 defense. When an affirmative defense "is obvious on the face of a complaint," a
17 defendant can assert that defense in a Rule 12(b)(6) motion. *Rivera v. Peri & Sons*
18 *Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013).

19 Defendants have no statute of limitations defense that is obvious from the face of
20 Ms. Mora's complaint. Defendants point instead to 29 C.F.R. § 1614.407(a), which
21 requires a person who has filed an administrative complaint arising under the
22 Rehabilitation Act to sue in a United States district court within 90 days of receiving the
23 final action on that administrative complaint. An applicant for employment at a covered
24 federal agency must follow administrative procedures to pursue a Rehabilitation Act
25 claim. See 29 C.F.R. § 1614.103(a)-(c); *Boyd v. United States Postal Serv.*, 752 F.2d
26 410, 412-13 (9th Cir. 1985). The first step in those procedures is consultation with an
27 Equal Employment Opportunity Commission ("EEOC") counselor, which must occur

1 within 45 days of the challenged action. 29 U.S.C. § 1614.105(a). Only after that
2 consultation may a complainant file a discrimination complaint, and she must do so
3 within 15 days of receiving a notice from the counselor. 29 U.S.C. § 1614.106(b).

4 Ms. Mora's complaint is wholly silent as to what steps, if any, she took to exhaust
5 her administrative remedies. Defendants rely on a document they put into the record, a
6 November 30, 2010 decision from the EEOC. Gugin Decl. (Dkt. # 13). In that decision,
7 the EEOC ruled that Ms. Mora did not contact an EEOC counselor until February 2010,
8 which was well after 45 days had passed from Defendants' allegedly discriminatory
9 conduct. The EEOC also concluded that Ms. Mora had "provide[d] no adequate
10 justification to warrant an extension of the applicable time limit for contacting an EEO
11 Counselor." For that reason, the EEOC upheld the Census Bureau's dismissal of Ms.
12 Mora's complaint. The EEOC decision also notified Ms. Mora that she had 90 days to
13 file a civil action in the appropriate district court.

14 Defendants cite no authority that would permit the court to consider the EEOC's
15 November 2010 decision on a Rule 12(b)(6) motion to dismiss. They do not suggest that
16 the EEOC's decision is a document subject to judicial notice. They do not suggest that
17 Ms. Mora's complaint incorporates the EEOC's decision by reference. They neither offer
18 argument nor legal authority for the proposition that a court may properly consider a so-
19 called "right-to-sue" letter on a motion to dismiss. The court is aware of no authority
20 squarely addressing this issue. It notes, however, that in the context of a suit subject to
21 the Prison Litigation Reform Act, the Ninth Circuit has recently ruled that a defendant
22 can move to dismiss via Rule 12(b)(6) for failure to exhaust administrative remedies only
23 "where a failure to exhaust is clear from the face of the complaint" *Albino v. Baca*,
24 No. 10-55702, 2014 U.S. App. LEXIS 6153, at *14 (9th Cir. Apr. 3, 2014) (en banc). A
25 defendant seeking to prevail on an exhaustion defense without trial must file a motion for
26 summary judgment. *Id.* at *18.

1 The court does not decide today whether a defendant in an employment
2 discrimination case may introduce into the record on a Rule 12(b)(6) motion to dismiss a
3 right-to-sue letter that is not incorporated into the plaintiff's complaint. No party has
4 presented argument that would permit the court to decide that question.

5 Instead, the court exercises its authority via Rule 56(f) to order Ms. Mora to show
6 cause why the court should not grant summary judgment that her suit is untimely. There
7 is no indication that Ms. Mora disputes the authenticity of the November 2010 EEOC
8 decision that Defendants submitted. There is no indication that Ms. Mora disputes that
9 she waited until long after 90 days had passed to file this lawsuit. And although Ms.
10 Mora suggests that her disability had some role in her delay in filing suit, she does not
11 suggest grounds that would allow the court to excuse her failure to file suit until more
12 than two and a half years had passed after the November 2010 EEOC decision. Even if
13 the court were to consider the suit that Ms. Mora voluntarily dismissed in October 2013,
14 she did not file that suit for more than two years after she received the November 2010
15 decision.

16 The court accordingly orders Ms. Mora to submit evidence or argument showing
17 that there is a genuine issue of material fact that would preclude the court from granting
18 summary judgment that her suit is untimely for failure to sue within 90 days of the
19 EEOC's November 2010 decision. She shall show cause in the form of a written
20 statement, including declarations or other evidence if appropriate, no later than May 22,
21 2014. Defendants need not respond to the statement unless the court orders a response.
22 If Ms. Mora does not respond by May 22, the court will enter summary judgment for
23 Defendants based on the current record.

24 III. CONCLUSION

25 For the reasons previously stated, the clerk shall TERMINATE Defendants'
26 motion to dismiss. Dkt. # 12. As stated above, the court orders Ms. Mora to show cause
27 why the court should not grant summary judgment in favor of Defendants. She shall

1 respond to this order no later than May 22, 2014, and the clerk shall create a motion
2 calendar for the same date to address that response.

3 DATED this 22nd day of April, 2014.

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7 The Honorable Richard A. Jones
8 United States District Court Judge
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